INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL., *Petitioners*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., ET AL., *Respondents*

Amicus Curiae Brief in Support of Petition for Writ of Certiorari

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AMICUS CURIAE BRIEF

LOWER COURT OPINIONS

The opinion of the U.S. Court of Appeals is reported as *Tillman* v. *Wheaton-Haven Recreation Association, Inc.*, 451 F. 2d 1211 (4th Cir. 1971), and a copy of this opinion is reproduced as Appendix B to the Petition for Writ of Certiorari. The opinion of the District Court is unreported, but a copy of this opinion is reproduced as Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The judgment of the U.S. Court of Appeals was entered on October 27, 1971. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was duly filed, but was denied by the U.S. Court of Appeals on December 16, 1971 (App. D of the Petition for Writ of Certiorari).

AMICUS CURIAE AUTHORITY

Authority to participate in these proceedings is founded on Rule 42(4) of the Rules of the Supreme Court of the United States. Montgomery County, Maryland, is a political subdivision of the State of Maryland, and the counsel under whose name this Brief is filed are the law officers of Montgomery County in whom participation is authorized. Article XI-A of the Constitution of Maryland; Article 25A of the Annotated Code of Maryland (1957 Edition) (1966 Replacement Volume); Article 2, Section 213 of the Charter of Montgomery County, Maryland.

QUESTION PRESENTED

Whether the U.S. Court of Appeals erred in holding a community recreation association to be a private club and, hence, exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C., Secs. 1981, 1982 and 42 U.S.C., Sec. 2000a), despite the fact that this Court in a previous case (*Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969)) held that an association with virtually identical characteristics

could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.[1]

STATUTE INVOLVED

The statutory provision involved is Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a).

Section 2000a provides:

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent

[1] Because the particular interest of Montgomery County in the decisions of the lower courts does not involve a question based on an application or interpretation of Sections 1981 and 1982 of Title 42 of the United States Code, these laws are not considered in this Brief. Only Section 2000a of Title 42 of the United States Code is involved in this Brief.

or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce; criteria; "commerce" defined

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or

there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Support by State action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by Officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

STATEMENT[1]

The Plaintiffs-Appellants instituted suit in Federal District Court (Civil Action No. 21294), Maryland District, against the Defendants-Appellees for violation of the Civil Rights Act of 1866 (42 U.S.C., Secs. 1981 and 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a). The Defendants-Appellees are Wheaton-Haven Recreation Association, Inc. (herein "Wheaton-Haven" or "Association") and thirteen individuals who were officers and directors of Wheaton-Haven at times material herein. The case was heard on cross Motions for Summary Judgment, as well as Plaintiffs'-Appellants' Motion for Preliminary Injunction. On July 8, 1970, the District Court rendered a verdict in favor of the Defendants. In ruling in favor of the Defendants, the District Court (Northrop, D.J.) found that the swimming pool facility here in question was operated as a private club and, therefore, no violation of the aforementioned Federal laws existed. The Plaintiffs-Appellants appealed to the U.S. Court of Appeals for the 4th Circuit (Case No. 14957). The Court of Appeals (Haynsworth, Boreman, Butzner, J.J.) affirmed the judgment of the District Court with one judge dissenting. On Petition for Rehearing, rehearing was denied, and Judges Winter and Craven joined in the dissent. The Plaintiffs-Appellants (herein Petitioners) have sought relief from that affirmance by filing a Petition for Writ of Certiorari to this Court.

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[1] The facts set forth below are based upon the District Court's findings, as modified by the Court of Appeals, with certain additional comments by Montgomery County, Maryland, as indicated in footnotes.

The Federal suit was instituted after the Montgomery County Commission on Human Relations, through its Panel on Public Accommodations, declared Defendant-Appellee, Wheaton-Haven Recreation Association, Inc. to be a public accommodation under County law and not entitled to an exemption as "distinctly private in nature." *Tillman, et al.* v. *Wheaton-Haven Recreation Association, Inc.*, Montgomery County, Maryland Commission on Human Relations, No. P.A. 6, June 3, 1969; *See* 1 Race Rel., L. Survey 231 (1970) (Vanderbilt Univ. School of Law). Enforcement of a Commission cease and desist order is presently awaiting Maryland State Court action.[3]

Wheaton-Haven, a non-profit Maryland corporation, was created in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Montgomery county, Maryland.[4] The pool, constructed in the 1958-59 season, was financed by subscriptions for membership collected from persons residing in the

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[3] The Panel's "Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order" are reproduced herein as Appendix B. The County requested the Court of Appeals to take judicial notice of this document. The document is an administrative decision rendered by a governmental agency pursuant to the laws of Montgomery County as implementing the full and plenary police powers of the State of Maryland. *Montgomery Citizens League* v. *Greenhalgh*, 253 Md. 151, 252 A. 2d 242 (1969). Such an administrative decision is entitled to a presumption of validity and full probative value. *Eger* v. *Stone*, 253 Md. 533, 253 A. 2d 372 (1969); *Heaps* v. *Cobb*, 185 Md. 372, 45 A. 2d 73 (1946).

[4] On September 23, 1958, Wheaton-Haven secured a special zoning exception as a "community swimming pool" as distinguished from a special exception for a "private club".

area.[5] The pool presently charges a $375 initiation fee and annual dues of $50-$60. As set out in the bylaws of the corporation, membership is open to bona fide residents of the area within a three-quarter mile radius of the pool. Members may be taken from the general public outside the three-quarter mile radius upon the recommendation of a member as long as the percentage of members from outside the area does not exceed 30 percent of the membership.[6] In either event, applicants for membership must be approved by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose. Membership, which is by family units rather than simply individually, is limited to 325 family units, but at no relevant time has the membership been filled so that in effect membership is not limited to the geographic area. In the event a member sells his property, the purchaser has the first option to purchase the seller's membership in the pool; but the procedure set out is for the seller to resign and the buyer to apply for membership, the application being subject to the approval of the Board of Directors. Negro families do reside within the three-quarter mile

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[5] The membership solicitation was found to be active, open and unqualified. Circulars and government facilities were used to effect solicitation of membership. No Negroes lived in the area at the time and, therefore, no membership qualifications were employed or interviews conducted. A large sign was posted at the pool site to attract new members. Panel Findings Nos. 7, 12 and 17, Apx. 13a-15a.

[6] There is no evidence of record as to what portion of this 30 percent actually constitutes non-residents of the area.

area;[7] and, while none of those families are members of the pool, there is no indication that any of them, other than the Plaintiff Press, has applied for membership. Wheaton-Haven records reveal that, prior to the application involved herein, only one application, that of a white man, has been rejected by the association in its eleven-year history.[8]

Only members and their guests are admitted to the pool. The public is not admitted to the Wheaton-Haven facility upon the payment of an entrance fee.

Dr. and Mrs. Harry C. Press, two of the Negro Plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and, therefore, had no interest in the pool which he could transfer. In the spring of 1968, however, Dr. Press sought to obtain an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with an application. The stipulated reason for not sending him an application was that Dr. Press is a Negro.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. Around July 19, 1968, the Tillmans brought Grace Rosner, a negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members. On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans

[7] The community had integrated by 1967. Panel Finding No. 15, Apx. 15a.

[8] For purposes of this appeal, Montgomery County accepts this fact although the Commission found no Caucasian was ever rejected. Panel Finding No. 16, Apx. 15a.

to bring Mrs. Rosner to the pool as a guest. The limitation on guests, while perhaps precipitated by the admission of Mrs. Rosner on July 19, was intended to keep down the burgeoning number of guests.[9]

The pool facility was constructed pursuant to a "special exception" granted by the Montgomery County Board of Appeals.[10] Prior to granting the special exception, the Board required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed.[11]

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[9] Interrogatories Nos. 29 and 31 of Plaintiffs-Appellants asked whether in 1968 and at the present time, Wheaton-Haven's policy has been to deny admission of Negroes to its facilities as the guests of members. The answer of Defendants-Appellees to both interrogatories is: "We did not have a written policy but we did have an understanding to discourage Negroes because we considered ourselves a private pool." The deposition of director McIntyre (a Defendant-Appellee), filed with the District Court, discloses beyond question that the relatives-only guest policy adopted on July 20, 1968, was intended to exclude Negroes as guests.

[10] The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955, now Sec. 111-37z-4, Montgomery County Code 1965. In the ordinance, the Council stated, ". . . this action sets up the community swimming pools as a special exception . . . Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreationl facilities, and believes that the County will be generally benefited by such development." (Admis. Nos. 1, 2, Pl. Exh. 2 in the District Court).

[11] Wheaton-Haven also had the burden of showing the special zoning exception was in the public interest in that it did not adversely affect the present and future character and development of the community. Sec. 111-37z-4, Montgomery County Code 1965. In that regard, Wheaton-Haven presented evidence to the Board that the proposed facility was in lieu of a County facility

Wheaton-Haven does pay state and local real estate taxes, but is exempt from state and federal income taxes under the Annotated Code of Maryland, Article 81, Sec. 288(d)(8) (1969 Replacement Volume) and the Internal Revenue Code, Sec. 501(c)(7) exempting non-profit, member-owned and controlled recreational facilities.

It should be noted that the Panel on Public Accommodations of the Montgomery County Commission on Human Relations, in reviewing the history and actions of Wheaton-Haven, had the benefit of the application file of the County agency which gave the authorization for construction and use of the community swimming pool facility, the Montgomery County Board of Appeals, and that part of the agency file consisted of a complete transcript of the proceedings before the Board of Appeals. The duplicity of the Association was well documented. Probably, in 1958, no racial exclusiveness was considered. The neighborhood was not well integrated until 1967 (Panel Finding No. 15, Apx. 15a). The Association's Bylaws, adopted in 1958, had no racial covenants or restrictions on membership (Panel Finding No. 14, Apx. 15a). However, as time went by, it became impossible to maintain racial segregation. It was then that overt opposition to Negroes began and it was then that the Association betrayed its public trust.

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to serve an imperative recreational need of the community, that the facility was needed for youths as a deterrent to juvenile delinquency, that the facility was for a community recreational need and not intended for private social functions, and that the facility would be advantageous and a public benefit to the community at large. Panel Finding No. 6, Apx. 13a.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Amicus curiae, Montgomery County, Maryland, adopts and incorporates by reference the "Reasons for Granting the Writ" as advocated in the Petitioners' Petition for a Writ of Certiorari.

In addition, Montgomery County urges that this Court grant a Writ of Certiorari for the following reasons.

Montgomery County is a home-rule county chartered under the Constitution and laws of Maryland and granted full and plenary state police powers to enact local laws, including *inter alia* the regulation of racial discrimination in designated places of public accommodation. *Montgomery Citizens League* v. *Greenhalgh, supra.* Pursuant to its police power, Montgomery County has enacted a local law prohibiting racial discriminatory practices in places of public accommodation, resort or amusement, of any kind, including "swimming pools". The only exemption from said law pertains to "accommodations which are in nature distinctly private." Section 77-1, et seq. of the Montgomery County Code 1965, as amended by Chapter 18, Laws of Montgomery County 1968, and Chapter 33, Laws of Montgomery County 1969 (a copy of this law is found in Appendix A). Pursuant to this local law and acting upon verified complaints of the petitioners in this matter, the Montgomery County Human Relations Commission's Panel on Public Accommodations, an agency of Montgomery County, conducted an extensive investigation and public hearing at public expense, and found the present Defendant-Appellee, Wheaton-Haven Recreation Association, Inc., to be a public accommodation within Montgomery County acting in

violation of the aforesaid local law. The opinion and finding of fact of the Human Relations Commission's Panel is found in Appendix B. Pursuant to its opinion, finding and decision, a cease and desist order was issued by the Human Relations Commission's Panel.

Defendant-Appellee, Wheaton-Haven Recreation Association, Inc., has refused to comply with either the aforesaid cease and desist order or local law, and Montgomery County has filed suit in a Maryland State Court of general jurisdiction (Circuit Court for Montgomery County, Maryland) to enforce the cease and desist order and seek compliance with the provisions of the local law. This State suit is presently pending in the Circuit Court for Montgomery County, Maryland, and involves the identical parties, facts and relief sought in the federal litigation.

The decision of the Federal District Court is based partly on the finding that the Defendant-Appellee, Wheaton-Haven Recreation Association, Inc., is a private club as that term is defined under the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) (Appendix C of Petition for Writ of Certiorari). While a federal court interpretation of a federal statute is not necessarily dispositive of a local law, the issue in this action as to the private nature of the Defendants'-Appellees' activities is of such a high degree of identity with the issue in the State court action that the Federal Court interpretations will have an adverse effect upon Montgomery County's case in the State court if the interpretation of the Federal Court is allowed to stand. Furthermore, the extraordinary involvement of identical parties and facts in both Federal and State courts raises the possibility that the doctrine of collateral estoppel could apply against the parties in a State

Court upon the termination of the Federal litigation. *Pat Perusee Realty* v. *Lingo*, 249 Md. 33, 238 A. 2d 100 (1968); *Maryland, Use of Gliedman* v. *Capital Airlines*, 267 F. Supp. 298 (D. Md. 1967).

The Defendant-Appellee operates its swimming pool facility by virtue of a "special exception" granted to it under the Zoning Ordinance of Montgomery County, Maryland. The special exception was granted by the Montgomery County Board of Appeals, and a copy of the opinion of the Board of Appeals as to this special exception is contained in Appendix C. The special exception granted is for the construction and use of a "community swimming pool" and not for a "private club". Under the Montgomery County Code a grant to operate a private club requires a special exception separate and distinct from that of a community swimming pool. By virtue of the decision and finding of the Federal Courts, the Defendants'-Appellees' operations are as a private club and, accordingly, the Defendant-Appellee may be operating its facilities contrary to the Montgomery County Zoning Ordinance.

Furthermore, the Defendant-Appellee has notified officials of Montgomery County, Maryland, that if the County persists in its State court action against the Defendant-Appellee in view of the decision of the U. S. District Court in this matter, a private civil suit will be instituted against Montgomery County and its officials (see Appendix D). Participation by Montgomery County in this matter may negate further court action by the County if appropriate relief is granted and also may negate the private civil action being contemplated by the Defendant-Appellee.

SUMMARY OF ARGUMENT

Under the laws of the United States and local laws of Montgomery County, Maryland, Wheaton-Haven Recreation Association, Inc., is a public accommodation which cannot discriminate on the basis of race.

The findings and decisions of the U. S. Court of Appeals for the Fourth Circuit and the U. S. District Court for the District of Maryland that Wheaton-Haven Recreation Association, Inc., qualifies under Title II of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000a, as a private club sanction racial discrimination as prohibited by that law and destroy the legitimate enforcement and administration of Montgomery County's local public accommodations and zoning laws.

ARGUMENT

It may well be true that Wheaton-Haven considers itself at this time a private club or, at least, that many of its members consider it to be a private club. Consistent with that desire, Wheaton-Haven, in recent years, has taken on a few accoutrements of a private organization. These contrived emblazonments, however, are not determinative of this controversy. They belie the factual history of the swimming pool facility. In attempting to metamorphose its genetic antecedents, Wheaton-Haven has repudiated its charter obligations which Montgomery County is seeking to reinstate.

The gravamen of Montgomery County's complaint against Wheaton-Haven is that it has defaulted on its representations and responsibilities to the County. In 1958, the organization sought authority from the County to construct and use a community swimming pool. To this end, the organization secured a special

zoning exception from the Montgomery County Board of Appeals for a "community pool." Sec. 111-37z-4, Montgomery County Code 1965. In addition to certain financial prerequisites, the Board had to find that the proposed use would be in the *public interest* in that it would not adversely affect the present or future character or development of the community. Wheaton-Haven presented extensive testimony that the facility was proposed in lieu of a county-built facility to meet an imperative community recreational need, that the facility was needed for community youths as a deterrent to juvenile delinquency, that the facility was for a community recreational purpose and not intended for social functions, and that the facility would be advantageous and beneficial to the community at large (Appendix B). The facts are clear that Wheaton-Haven represented that it was meeting a need for a community service. Conjunctively, in obtaining the special exception the organization also assumed a responsibility to provide a community service which the local governmental authorities were unable to provide. No private facility was created.

Wheaton-Haven chose its status as a community pool over another existing zoning category designated as "private club,"[12] Sec. 111-37n, Montgomery County Code 1965. After Wheaton-Haven received for eleven years the benefits and favored tax status of a community pool, the lower courts have now subverted the

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[12] Private club: An incorporated or unincorporated association for civic, social, cultural, religious, literary, political, recreational or like activities, operated for the benefit of its members and not open to the general public. A private club is not afforded the same tax exempt status available to community pools. Annotated Code of Maryland, Art. 81, Sec. 288(d)(8) (1969 Replacement Volume).

purposes of the Montgomery County Zoning Ordinance by converting Wheaton-Haven to a private club. The Montgomery County Council was cognizant of this zoning distinction between private clubs and community swimming pools when it declared in 1962 that swimming pools were classified as public accommodations subject to the County anti-discrimination provisions. The lower courts failed to recognize the significance of these local laws and, in this failure, honored form over substance. Cf. *Tauber* v. *County Board of Appeals,* 257 Md. 202, 262 A. 2d 513 (1970) (imposing burden on applicant to meet public interest requisites).

Wheaton-Haven's present policy of racial segregation abrogates its duty as a public facility and adversely affects the future development of the community in that Negroes are discouraged from migration into the community, effectively creating a racial zoning ordinance without County sanction and which is inconsistent with and in derogation of the County's public policy established by enactment of a local fair housing law.[18] (Appendix A) See *Montgomery Citizens League* v. *Greenhalgh, supra.* There is a very real relationship between the opportunity for a Negro, or any other individual of a racial, color, religious or national origin minority group, to obtain housing in any geographic area and the accessibility of neighborhood recreational facilities. Everyone knows that the Wheaton-Haven swimming pool is open to everyone in its neighborhood—at least everyone who is white. Neighborhood swimming pools which are closed to

[18] Sec. 77-1, et seq., Montgomery County Code 1965, as amended by Chap. 18, Laws of Montgomery County 1968 and Chap. 33, Laws of Montgomery County 1969.

blacks inhibit their freedom and right to move into an integrated neighborhood. The County has a fair housing and public accommodations law which are reflective of the County's interest and concern in securing free and equal treatment of all its citizens. This interest and concern is consistent with federal law. It is in light of this community of interest that the impact of the lower courts' decisions must be viewed.

The Supreme Court has conclusively held the provisions of the Federal Public Accommodations Law, 78 Stat. 243 (1964), 42 U.S.C., Sec. 2000a (1970), to cover swimming areas and associated recreational facilities. *Daniel* v. *Paul,* 395 U.S. 298 (1969). The law is to be construed liberally and read broadly. *Miller* v. *Amusement Enterprises, Inc.,* 394 F. 2d 342 (5th Cir. 1968). From this broad coverage a narrow exemption was carved under Sec. 2000a(e) of the law for *bona fide* social, fraternal, civic and other organizations which *select* their own members. *United States* v. *Richberg,* 398 F. 2d 523 (5th Cir. 1968). To qualify for this exemption, the burden is upon Wheaton-Haven to establish that it is, de facto and not de jure, a private club. *Nesmith* v. *Young Men's Christian Association of Raleigh, N. C.,* 397 F. 2d 96 (4th Cir. 1968).

> In determining whether an establishment is in fact a private club, *there is no simple test.* A number of variables must be examined in the light of the Act's clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective . . . .' As one commentator observed, 'Where there is a large membership or a policy of admission *without any kind of investigation of the applicant,* the logical conclusion is that membership is not selective. . . .
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> [S]erving or offering to serve all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club." *Nesmith* v. *Young Men's Christian Association of Raleigh, N. C., supra,* at 101-102 (emphasis added).

The variables are considerable and no one criteria alone is fatal to or a conclusive determinant of the claimed exemption without consideration of the totality of facts. *Bell* v. *Kenwood Golf and Country Club, Inc.,* 312 F. Supp. 753 (D. Md. 1970). A comprehensive, but not exclusive, analysis of these variables is recited in *United States* v. *Jordan,* 302 F. Supp. 370 (E.D. La. 1969), where the District Court listed seven broad elements for consideration:

1. Membership genuinely selected on a reasonable basis;
2. Membership control over operation and property;
3. Manner of creation including advertising and solicitation of charter members;
4. Purpose of organization as it relates to social, fraternal or civic functions;
5. Formalities of organization;
6. Extent of invitation to public manifested by advertising, telephone listings, initiation fees, dues;
7. Use of private club tax exemptions and credit extended to members.

Of all these variables, the most frequently used factual test is whether the membership is genuinely selective.

Scott v. *Young*, 421 F. 2d 143 (4th Cir. 1970) *Cert. Denied*, 398 U.S. 929 (1970); *United States* v. *Jordan*, *supra*; *Stout* v. *Young Men's Christian Association of Bessemer, Alabama*, 404 F. 2d 687 (5th Cir. 1968); *United States* v. *Richberg*, *supra*; *Nesmith* v. *Young Men's Christian Association of Raleigh, N.C.*, *supra*; *Williams* v. *Rescue Fire Company*, 254 F. Supp. 556 (D. Md. 1966); *Clover Hill Swimming Club* v. *Goldsboro*, 47 N.J. 25, 219 A. 2d 161 (1966); *United States* v. *Clarksdale King & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965); *Castle Hill Beach Club* v. *Arbury, N.Y.*, 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 2d 186 (1957). Moreover, this factual test has become the conclusive law of the land.

> The Virginia trial court rested on its conclusion that Little Hunting Park was a *private social club*. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, *there being no selective element* other than race. *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 236 (1969) (emphasis added).

Elements of this factual test that membership be genuinely selective on a reasonable basis have been repeatedly articulated and determined in numerous court cases. Wheaton-Haven has failed to meet any of these indicia of private clubs. These elements are as follows:

1. Whether members, *in fact*, control the membership procedure through actual notice of prospective applicants, power of blackball and membership revocation. *Bell* v. *Kenwood Golf and Country Club, Inc.*, *supra*; *United States* v.

Jordan, supra; Clover Hill Swimming Club v. *Goldsboro, supra; Williams* v. *Rescue Fire Company, supra; United States* v. *Clarksdale King & Anderson Co., supra; Castle Hill Beach Club* v. *Arbury, N.Y., supra.*

2. Whether prospective members are required to be recommended for membership by one or more existing members. *Stout* v. *Young Men's Christian Association of Bessemer, Alabama, supra; United States* v. *Jordan, supra.*

3. Whether there is any limit on the number of members other than the capacity of the facility. *Nesmith* v. *Young Men's Christian Association of Raleigh, N.C., supra; United States* v. *Jordan, supra; Clover Hill Swimming Club* v. *Goldsboro, supra.*

4. Whether there is any manifestation of standards for membership qualifications including such factors as articulated personal requirements (social position, reputation, residence), rejection rates, extent of applicant investigation, reference requirements, time period for approval, rates of membership revocation, and formalities of initiation (fees, dues, ceremonies, documents). *United States* v. *Jordan, supra; Stout* v. *Young Men's Christian Association of Bessemer, Alabama, supra; United States* v. *Richberg, supra; Nesmith* v. *Young Men's Christian Association of Raleigh, N.C., supra; Williams* v. *Rescue Fire Company, supra; Castle Hill Beach Club* v. *Arbury, N.Y., supra.*

The determination of whether or not an organization is entitled to the "private club" exemption contained

in subsection (e) of Section 2000a of Title 42 of the U.S. Code is a question of law. *United States* v. *Richberg, supra.* Here, the underlying facts are not in dispute. Unfortunately, the findings of the Court of Appeals reflect such an erroneous misinterpretation of the undisputed facts in this controversy that a detailed examination of the findings must be undertaken. This is necessary because the unprecedented findings of privacy by the lower court are clearly erroneous or unsupported or are mere superficial variables which nither collectively, nor individually, can be held, as a matter of law, to be conclusive. The findings of the Court of Appeals were as follows:

> 1. "Its structure is that of a private association, though that is not of great weight, since it is relatively easy for a place of public accommodation to take on the formal features of a club without changing its nature. Unlike every organization which has ever been held to be a 'sham' private club, Wheaton-Haven is owned, operated and controlled entirely by its membership." 451 F. 2d at 1219-1220.

The Court was correct in admitting that no great weight can be given to the "structure" of Wheaton-Haven. This consideration together with "ownership" are transparent formalities of a private club and which fail to look beyond the corporate shell to the real purpose of the organization, i.e., to provide a community swimming facility to all white persons living within a prescribed geographic area. *United States* v. *Richberg, supra.* Here, the Court applied a variable used in *Daniel* v. *Paul, supra,* i.e., traditional formalities associated with a private club, self-government and member ownership. Moreover, the corollary to this

rule was adopted in *Bell* v. *Kenwood Golf and Country Club, Inc., supra,* where the court refused to make the absence of self-government fatal to a claim for the exemption of a private club. However, this one factor of member ownership has never been held conclusive and is more than outweighed by Wheaton-Haven's open invitation to the white community as manifested by: its active and unqualified solicitation of charter members; its advertising membership availability by a large conspicuous sign posted at the pool; its superficial membership approval procedure which lacks any meaningful interview, investigation or evaluation of membership qualifications; its low, if not negligible rejection of whites; and its failure to make membership available to Negroes despite their presence in the community (Panel Findings Nos. 7, 12, 15, 16, 17, 18; Apx. 13a-15a).

2. "It was initially financed through the initiation fees of the first members, and new members must make a comparatively heavy investment of $375 in order to join." 451 F. 2d at 1220.

This consideration is not a valid consideration. In *Bell* v. *Kenwood Golf and Country Club, Inc., supra,* the initiation fees, depending on membership classification, ranged from $600 to $1,500. 312 F. Supp. at 755. The Kenwood Golf and Country Club is located in Montgomery County also, and it is unrealistic to state that $375 is a "heavy investment" in Montgomery County.

3. "The members of the Board of Directors are required to be club members." *Id.*

No express qualification for membership exist. There is *de jure* control of the operation of facilities and

selection of members. But this is not a valid consideration in light of the fact that there is no actual membership control other than an annual meeting! This point is nothing more than another meaningless traditional formality.

4. "Regular membership meetings are held, and member participation is strickingly high." *Id.*

This finding is, unfortunately, misleading. The only "regular membership meeting held" is the *annual* membership meeting. That is the only real membership participation which exists in this association.

5. "Substantial annual dues are charged, and members are liable for further assessments if the dues are insufficient to meet annual expenses." *Id.*

Again, *Bell* v. *Kenwood Golf and Country Club, Inc., supra,* is dispositive. It is absolutely unreasonable to conclude that in Montgomery County, Maryland, an annual dues of $50-$60 is substantial. Such a conclusion fails to recognize the reality of the operative facts. The pool facility is located in an affluent section of Montgomery County which is one of the very wealthiest counties in the United States.

6. "Only members and their guests can use the pool. There is no way in which a non-member, by payment of an admission fee, can gain entrance." *Id.*

These two indicia are coupled because they are similar. They are mere self-serving devices which represent a bootstrap conclusion and must yield to the obvious reality that all organizations declaring themselves pri-

vate clubs have so limited the use of their facilities. Despite such self-serving declarations of privacy and the restrictions on use, the courts have universally taken substance over form to determine whether there is *in fact* a private nature to the organization. *Sullivan* v. *Little Hunting Park, supra; United States* v. *Richberg, supra; Nesmith* v. *Young Men's Christian Association of Raleigh, N.C., supra; United States* v. *Clarksdale King and Anderson Co., supra.*

7. "Nor does Wheaton-Haven publicly solicit members." *Id.*

This conclusion is erroneous. The solicitation of members by Wheaton-Haven, prior to pressures for integration, were open and notorious. There is no question as to Wheaton-Haven's open invitation to the white community. Note subparagraph 1, *supra;* also Panel Findings Nos. 6, 7, 12, 16, 17, 18; Apx. 13a-15a. The only membership qualification was an ability to pay. Furthermore, the stated purpose of the organization was not social or fraternal, but purely to serve a community recreational need. These factors, in addition to Wheaton-Haven's inability to meet the genuine selectivity test, *infra,* would deny to the organization the private club exemption under the criteria set forth in *United States* v. *Jordan, supra.*

8. The Court of Appeals also deduced that Wheaton-Haven does not hold itself out in any way as serving the general public. *Id.*

This conclusion must be an attempt to neutralize *Nesmith* v. *Young Men's Christian Association of Raleigh, N.C., supra.* This conclusion is possibly the most extreme example of embracing form over sub-

stance in the appeals court's decision. How can the court ignore the admissions by Wheaton-Haven as to serving the "recreational needs of the community" (Panel Finding No. 6, Apx. 13a), the indiscriminate solicitation of funds to meet construction costs (Panel Finding No. 7, Apx. 13a), the sham interviews (Panel Finding No. 12, Apx. 14a-15a), the posting of the invitation sign (Panel Finding No. 17, Apx. 15a), and the low rejection rate (Panel Finding No. 16, Apx. 15a)?

9. The lower court also found that it was not relevant that "for zoning purposes" the name "community swimming pool" was used. *Id.*

This finding evidences the lower court's failure to consider the significance and importance of zoning laws. Zoning laws are second to no other statutory body in regulating the conduct of individuals or groups. On a local level, the power and pervasiveness of zoning laws is ominous. Possibly no other body of law contains as many "words of art." "Community swimming pool" did not mean "private swimming pool". There was provision under the County zoning laws for a "private swimming pool." Wheaton-Haven, properly, did not seek a special exception as a private swimming pool. It declared that it intended to serve the community, to serve as a deterrent to juvenile delinquency, to serve the recreational needs of the community (Panel Finding No. 6, Apx. 13a). The Montgomery County Council, in enacting the relevant zoning code provision, recognized that "community swimming pools" were to meet "community needs" (Panel Finding No. 5, Apx. 12a-13a).

10. Finally, the appeals court made a finding that Wheaton-Haven met the test of exclusivity. 451 F. 2d at 1220-1221.

As to this finding, the court failed to point to any item within the operative facts other than commenting on the rejection rate of one white applicant. The court stated that some considerations are "implicit". This conclusion by the lower court is completely unfounded. Indeed, it is the area of selectivity that Wheaton-Haven is most vulnerable. This test is the most important one. The test is set forth in *Sullivan* v. *Little Hunting Park, supra* and *Nesmith* v. *Young Men's Christian Association of Raleigh, N.C., supra.* Wheaton-Haven admittedly possesses no articulated admission standards and performs only a superficial interview with no membership reference requirement or even a rudimentary investigation of the applicant's basic character traits, social or economic position. The rejection of one white applicant since inception (an eleven-year period) clearly manifests Wheaton-Haven's "open door" policy to the community and easily meets the ninety-nine percent acceptance of whites ratio present in *Nesmith, supra.* In *Nesmith,* five whites were rejected in a one-year period. As in *Nesmith,* Wheaton-Haven has rejected one hundred percent of Negro applicants. The appeals court erroneously allowed counsel for Wheaton-Haven to state at oral argument that other white applicants had been informally rejected. This statement is completely unfounded. There is no evidence in the record below to substantiate this self-serving testimony of Wheaton-Haven's counsel. 451 F.2d at 1221, n. 23. The testimony is in diametric conflict with the sworn answer of Wheaton-Haven to the Petitioners' interrogatory No.

17 which indicates that no one other than Dr. Press was ever denied an application form.

It also should be noted that there was no finding by either of the lower courts that the membership actually controlled the selection process. The cases are replete with findings that membership committees alone do not constitute any real manifestation that the membership actually selects new members. *Stout* v. *Young Men's Christian Association of Bessemer, Alabama, supra; Nesmith* v. *Young Men's Christian Association of Raleigh, N.C.; Clover Hill Swimming Club* v. *Goldsboro, supra; Williams* v. *Rescue Fire Company, supra; United States* v. *Clarksdale King & Anderson Co., supra.*

Furthermore, the District Court's failure to consider the low ratio as a significant factor of non-privacy is inconsistent with that court's prior holding in *Williams* v. *Rescue Fire Company, supra,* where the court did consider the absence of rejection and a low revocation ratio. The case law on this point stands for the proposition that low rejection ratios are indicative of a non-private nature. *Nesmith* v. *Young Men's Christian Association of Raleigh, N.C., supra.* It indeed would be hard to find a truly bona fide private club whose existence is fostered by social selectivity with such a low rejection rate.

Two final points should be considered. The lower courts placed some significance on Wheaton-Haven's membership limitation of 325 families. This element is misleading because it ignores the reality that a limit on membership to those who can be effectively served by the capacity of the facility is a normal incident of such a recreational facility, public or private. The

element has also been held to be an insignificant factor, and does not operate to change a public accommodation to a private club. *United States* v. *Jordan, supra; Clover Hill Swimming Club* v. *Goldsboro, supra.*

Furthermore, the fact that thirty percent of the membership can be drawn from outside the geographic area of the neighborhood is irrelevant. This element also is misleading because it ignores the fact that a substantial majority, at last seventy percent of the membership, is drawn from a specified geographical area and any white person living in that area is accorded a priority for membership over the general public. It should be recognized that in *Williams* v. *Rescue Fire Company, supra,* it was held that a swimming pool was not afforded the private club exemption despite the fact that twenty-five percent of the membership actually resided outside the geographic area. In any event, *Sullivan* v. *Little Hunting Park, supra,* is dispositive of this point because the swim club there had the same provisions as here and failed to qualify as a private club.

Primary importance must be given to the fact that all the indicia of privacy came into being well after the swimming pool was constructed and fully operational. It was only with the advent of racial integration in the neighborhood that the swimming pool aspired to exclusivity. The Opinion and Findings of Fact of the County's Human Relations Panel on Public Accommodations establish beyond any doubt that the swimming pool facility was conceived in "openness" and has embraced "privacy" only recently (Appendix B). The totality of Wheaton-Haven's operations leads to only one conclusion:

Its existence is transparently meretricious and paper thin. To hold that it was an exempt club would make a mockery of the club exemption, would pervert the congressional purpose and would legitimize a mere stratagem." *United States* v. *Richberg, supra* at 529.

CONCLUSION

For the foregoing reasons, Wheaton-Haven should not be entitled to an exemption as a private club under Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) and, therefore, the judgment below should be reversed.

Respectfully submitted,

RICHARD S. MCKERNON
Acting County Attorney for Montgomery County, Maryland
ALFRED H. CARTER
Deputy County Attorney
WILLIAM J. CHEN, JR.
Assistant County Attorney
County Office Building
Rockville, Maryland 20850

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